BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20423

ALLIED ERECTING AND DISMANTLING, INC. and ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,	:	
	:	STB Docket No. 35316
Petitioners,	:	
v.	:	**SUPPLEMENTAL PETITION FOR DECLARATORY ORDER**
OHIO CENTRAL RAILROAD, INC., OHIO & PENNSYLVANIA RAILROAD COMPANY, THE WARREN & TRUMBULL RAILROAD COMPANY, YOUNGSTOWN & AUSTINTOWN RAILROAD, INC., THE YOUNGSTOWN BELT RAILROAD COMPANY, THE MAHONING VALLEY RAILWAY COMPANY, and SUMMIT VIEW, INC., collectively d/b/a The Ohio Central Railroad System, and GENESEE & WYOMING, INC.,	:	226135
Respondents.	:	

Richard H. Streeter, Esquire
Barnes & Thornburg
750 17th Street, NW, Suite 900
Washington, DC 20006
202-289-1313
Fax: 202-289-1330

Christopher R. Opalinski, Esquire
F. Timothy Grieco, Esquire
Jacob C. McCrea, Esquire
Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219
(412)-566-5963
Fax: (412)-566-6099

Attorneys for Petitioners
Allied Erecting and Dismantling, Inc.
Allied Industrial Development Corporation

BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20423

ALLIED ERECTING AND DISMANTLING, INC. and ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,	:	
	:	STB Docket No. 35316
Petitioners,	:	
v.	:	
OHIO CENTRAL RAILROAD, INC., OHIO & PENNSYLVANIA RAILROAD COMPANY, THE WARREN & TRUMBULL RAILROAD COMPANY, YOUNGSTOWN & AUSTINTOWN RAILROAD, INC., THE YOUNGSTOWN BELT RAILROAD COMPANY, THE MAHONING VALLEY RAILWAY COMPANY, and SUMMIT VIEW, INC., collectively d/b/a The Ohio Central Railroad System, and GENESEE & WYOMING, INC.,	:	
Respondents.	:	

SUPPLEMENTAL PETITION FOR DECLARATORY ORDER

Petitioners, Allied Erecting & Dismantling, Inc. and Allied Industrial Development Corporation (collectively "Petitioners"), by their attorneys, file this Supplemental Petition For Declaratory Order, pursuant to the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 et seq. In support of the Supplemental Petition, Petitioners state as follows:

Petitioners make this supplemental submission in order to respond to unaddressed issues raised in Respondents' Reply and to clarify Petitioners' position on the need for discovery in this matter, the scope of the issues to be determined by the Board, and the procedural schedule.[1]

A. PETITIONERS ARE ENTITLED TO AND REQUEST THE ABILITY TO CONDUCT DISCOVERY.

Respondents assert that discovery was "available" in the state court action and no further discovery is needed to address the issues before the Board. It appears that now that Respondents have forced this case to be submitted to the Board, they would like to cut off any further inquiry into the facts of this matter and attempt to gain an advantage by having the case submitted "as is" on written submissions. Petitioners forcefully oppose any such effort and request the Board to allow Petitioners a full and fair opportunity to support their case.

As Respondents concede, discovery was not completed in the state action. (See Reply, p. 6.) Indeed, the depositions of at least four (4) witnesses were in the process of being scheduled, but were halted when the state court issued the stay order. These included Terry Feichtenbiner, Bryan Freeman, and Rick McCracken (all three Ohio Central representatives); and RailCar Management, Inc., a third party car-hire and car management corporation for Respondents. In addition, Petitioners have not received responses to their Second Set of Document Requests, as well as numerous other requests for supplemental documents either identified in depositions or responsive to Petitioners' first set of discovery requests. (See Second Set of Document Requests, and Letter from Petitioners' Counsel to T. Lipka, dated May 12,

[1] It should be noted that, while Respondents have entitled their first response to the Petition as a "Reply," their submission – more in the nature of a motion – requests various relief that was in no manner addressed by the Petition. For example, Respondents ask for the dismissal of parties, the institution of modified procedures and a procedural schedule, and a determination of the issues to be decided. Cognizant of the traditional prohibition of a Reply to a Reply, Petitioners have styled this submission as a Supplemental Petition. Petitioners request that, whether it be considered a permissible Reply to what is essentially a Motion or a rebuttal to the Reply, this Supplemental Petition be accepted by the Board so as to allow Petitioners to address the issues raised in Respondents' Reply.

2009, attached hereto as Exhibits A and B, respectively.) Other witnesses may need to be deposed as well, including Bill Strawn.

Respondents have not been forthcoming in their discovery responses and a motion to compel may be required. Despite comprehensive requests for documents regarding the history, nature, purpose, and character of the railroad tracks at issue, Respondents have produced only basic documentation regarding the easements involved (documents Petitioners already had) and the transactional documents from the purchase of the railroads by Summit View, Inc. In short, these productions have been wholly inadequate. After counsel for Petitioners inquired repeatedly and threatened a motion to compel, counsel for Respondents promised a fuller production and, in fact, was working on gathering documents when the state court stay order was issued. (See email correspondence from T. Grieco to T. Lipka, dated September 1, 2009, attached hereto as Exhibit C.)

Whether by design or inadvertence, Respondents lack of forthrightness in this matter cannot be allowed to prevail. A prime example of this is reflected in Respondents' approach to allegations that none of them had any further rights to operate over the tracks related to the P&LE Easement. As late as April 14, 2009 in an Affidavit by Terry Feichtenbiner, Respondents represented that they acquired rights to the P&LE Easement and currently still had rights to use the tracks covered by this Easement. (See Feichtenbiner Aff. at 8-9, attached hereto as Exhibit D.) However, Respondents, in their Reply before the Board in this matter, now have finally admitted that any rights they had to operate over these tracks were terminated as of December 1, 2006 when Youngstown and SouthEastern began operating over the tracks. (Reply at 15-18.)

Contrary to Respondents' assertions, there are critical fact issues that necessitate discovery in order that Petitioners may fully and fairly present their case to the Board. These issues include, but are not limited to, the following: whether Petitioners' claims or relief involve

unreasonable interference with interstate railroad operations;[2] the historical and current use of the railroad tracks at issue; the customers or shippers served by the tracks; whether Respondents "need" to continue to store or stage cars on these tracks;[3] whether the tracks are used in interstate commerce; the dates on which or frequency with which railcars were stored, parked or switched on these tracks; the number or volume of railcars so stored, parked or switched on these tracks; the contents of these railcars, including any hazardous materials that may have contaminated Petitioners' property; whether the tracks involved are considered a mainline or are simply spur, side or industrial tracks; the existence and source of any alleged common carrier obligations relied upon by Respondents; whether the tracks involved were designed to simply serve the defunct steel mills or allowed for other traffic; the existence or not of underlying property rights for Respondents to operate over these tracks, including any claimed right to operate over the P&LE tracks prior to 2004; the corporate structure and "operator" status of any and all of the Respondents; in the event the Easement Agreements are deemed ambiguous, any evidence as to the intent, understanding or customary meanings of the language used in the Easements; and the damages incurred by Petitioners as a result of Respondents' improper parking, staging, storing, and switching of railcars.

These questions may even necessitate an oral hearing, but Petitioners believe that discovery should take place first and then the parties can submit their positions to the Board as to whether an oral hearing is necessary. However, at the very least, Petitioners should be afforded the right to conduct discovery under 49 CFR Part 1114. Even the Decision cited by Respondents

---

[2] It is noteworthy that even Respondents recognized that this was a factual issue by submitting the affidavit of Terry Feichtenbiner specifically on this issue and by offering to submit oral evidence to the State Court at a hearing. (See Feichtenbiner Affidavit.)

[3] Respondents also submitted a supplemental affidavit of David Collins to support their contention that they need to store cars on these tracks and will be detrimentally impacted if they are not allowed to continue this practice. Apparently, Respondents believe that Petitioners must accept this conclusory factual assertion by Mr. Collins and are not allowed any opportunity to cross-examine or investigate these assertions. (See Collins Affidavit, attached hereto as Exhibit E.)

in their Preliminary Statement holds that the parties, under the modified procedures, would be afforded the right to discovery under 49 CFR Part 1114. See West Point Relocation, Inc. and Eli Cohen - Petition for Declaratory Order, STB Finance Docket No. 3529 at p. 2.

In sum, Petitioners need discovery and request the right to conduct discovery. Respondents' discovery responses in the state court action were woefully inadequate and there are various factual issues that need investigated before further submissions can be made to the Board. Any schedule issued by the Board thus should take into consideration the need for this discovery.

B. IF THE BOARD ACCEPTS JURISDICTION, IT SHOULD DECIDE ALL OF THE ISSUES DELINEATED IN SECTION IV AND THE "WHEREFORE CLAUSE" OF THE PETITION.

Respondents argue that Petitioners impermissibly request the Board to decide issues outside the scope of the referral order issued by the state court. This assertion is incorrect and also contradicts the very referral order drafted by Respondents.

It first should be noted that Petitioners argued against the Board's jurisdiction and opposed the motion to refer filed by the Respondents in the state court. (A true and correct copy of Petitioners' opposition brief is attached hereto as Exhibit F.) While, as explained below, Petitioners still believe that none of the issues raised by Petitioners implicates the Board's jurisdiction, if the Board is inclined to accept the state court's invitation to determine this dispute, the Board should determine all of the issues necessary to resolve the parties dispute as it relates to the tracks on the two easements involved. This includes determining not only whether the easement agreements have been breached, but whether Respondents have any remaining rights under the easements or to operate over Petitioners' property covered by the easements.

In this regard, Respondents appear to take issue with Paragraph 34 of the Petition, which asks the Board to determine Respondents' rights to operate over any of the tracks associated with

the two easements. However, Petitioners are unclear how these issues fall outside the scope of the referral order or the underlying state case. The First Amended Complaint in the state court action pled a trespass claim, alleging that Respondents had no rights to traverse over the tracks related to the two easements. While this claim was originally related to the P&LE Easement and side tracks adjacent to this easement, a subsequent purchase of a parcel adjacent to the tracks related to the LTV easement has called into question whether Respondents have any further rights to traverse the tracks covered by the LTV easement. As explained in Paragraphs 10-11, 29, 31 and 35 of the Petition, any rights Respondents may have had under the LTV easement have been extinguished by merger principles due to the purchase of the adjoining parcel by Petitioners. These issues were raised in the state court action, and if this Board has jurisdiction over them, then the Board should decide them now and not force Petitioners to file a separate or subsequent petition with the Board. Basic principles of judicial economy and efficiency would dictate no less.

On the other hand, if this Board rules (or Respondents believe) that this Board does not have jurisdiction over and will not rule upon the trespass issues, including the merger issues, then this should be clearly stated by the Board (or acknowledged by Respondents) so that Respondents do not later attempt for the state court to send back further issues to this Board that could be decided now. This also applies to other issues that Respondents are conveniently ignoring, such as the contamination allegations. If the Board is not going to decide these issues, then the Board should clearly carve out these issues in its ruling so that the state court is afforded a clear understanding of not only what the Board decided but also what the Board was NOT willing to decide on any of the issues raised by the First Amended Complaint. Petitioners very much fear that Respondents are engaging in a sort of a shell game, where no matter where Petitioners turn, they can neither get discovery nor a day in court on the issues they have raised.

Respondents' attempt to limit the questions the Board can entertain is also directly contradicted by the very referral order Respondents drafted and the state court adopted wholesale. That order states that "this Order not be read to limit the authority of the [Board] to address, outside of the scope of this referral, other issues over which the Board has authority." Thus, even if the issues raised in Paragraph 34 of the Petition are technically outside of the scope of the referral order, there is no prohibition against raising them with the Board.

Another good example of the potential problems in determining what issues get decided by the Board is the issue of damages. This issue is clearly encompassed by the referral order but Respondents act, under their procedural schedule, as if it is not going to be determined. Clearly, any determination on damages will require much discovery that has not taken place and a potential expert report. If the Board does not wish to or cannot determine damages, Petitioners request that this be made clear in its preliminary scheduling ruling so that discovery can be modified accordingly.

C. SUMMIT VIEW, INC. AND GENESEE & WYOMING, INC. ARE PROPER PARTIES.

Respondents contend that Summit View and Genesee & Wyoming are not proper parties and should be dismissed from this case. However, Respondents offer no factual or legal support for this contention. It is entirely too premature to decide this issue. Respondents can present this position in their final briefs after discovery has taken place. In the meantime, their request should be denied.

D. THE BOARD SHOULD ISSUE A SCHEDULE THAT ALLOWS FOR FULL AND FAIR DISCOVERY, AND MAKE A PRELIMINARY DETERMINATION OF JURISDICTION AND THE ISSUES TO BE DECIDED.

As Petitioners argued at the state court level, the present dispute between the parties does not implicate the Board's jurisdiction. As in PCS Phosphate Company, Inc. v. Norfolk Southern

Corp., 559 F.3d 212 (4th Cir. 2009), disputes regarding a railroad's breach of an easement is not preempted by ICCTA "because it is not the sort of rail 'regulation' contemplated by the statute and, as a voluntary agreement, does not 'unreasonably interfere' with rail transportation." The Board, as Petitioner does, may read the Petition, First Amended Complaint, and the various allegations and easily conclude that the Board has no role in deciding this matter and it should be sent back to state court. For these reasons, Petitioners urge the Board to make a preliminary schedule in which the jurisdictional issue is decided first, before any briefing on the merits. Discovery limited to jurisdictional issues would be allowed. It makes no sense to have the parties submit briefs on the merits when it is far from clear whether the Board will hear this case and, if so, what issues are going to be determined. A proposed scheduled for this bi-furcated proceeding should be as follows:

Day 0 - Board Institution of Proceeding
Day 60 - Discovery Closes
Day 75 – Petitioners' Brief Due on Jurisdiction of Board
Day 90 – Respondents' Brief Due on Jurisdiction of Board
Day 100 – Petitioners' Reply Brief Due on Jurisdiction of Board

The Board then would receive proposed schedules from the parties for discovery and merit briefing on the issues, if any, the Board states that it has jurisdiction to rule on.

If the Board declines to follow this approach, Petitioners request that, at a minimum, 90 days of discovery be worked into the schedule proposed in Respondents' Reply, as follows:

Day 0 - Board Institution of Proceeding
Day 90 - Discovery Closes; Parties may conduct written and oral discovery
Day 120- Petitioners' Opening Statement and Argument Due
Day 150 – Respondents' Opening Statement and Argument Due
Day 165 – Petitioners' rebuttal Due

E. CONCLUSION

For all of the foregoing reasons, Petitioners request that the Board (1) issue a preliminary schedule as outlined above allowing for a determination of its jurisdiction and the issues that it is going to decide, (2) deny as premature Respondents' request to dismiss Summit View, Inc. and Genesee and Wyoming, Inc., and (3) if the Board proceeds directly to briefing on the merits, provide for full and fair discovery for the parties by instituting the alternative schedule outlined above with at least 90 days for written and oral discovery.

Respectfully submitted,

/s/ Richard H. Streeter
Richard H. Streeter, Esquire
Richard.Streeter@btlaw.com

Barnes & Thornburg
750 17th Street, NW, Suite 900
Washington, DC 20006

Christopher R. Opalinski, Esquire
Pa. I.D. No. 25367
copalinski@eckertseamans.com
F. Timothy Grieco, Esquire
Pa. I.D. No. 81104
tgrieco@eckertseamans.com
Jacob C. McCrea, Esquire
Pa. I.D. No. 94130
jmccrea@eckertseamans.com

Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219

Attorneys for Plaintiffs
Allied Erecting and Dismantling, Inc.
Allied Industrial Development Corporation

Dated: December 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Petition for Declaratory Order was served upon the following counsel by first class United States mail, this 8th day of December, 2009.

C. Scott Lanz, Esquire
SLanz@mbpu.com
Thomas Lipka, Esquire
TLipka@mbpu.com
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, OH 44503

Eric M. Hocky, Esquire
ehocky@thorpreed.com
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market Street, Suite 1000
Philadelphia, PA 19103

/s/ Richard H. Streeter
Richard H. Streeter, Esquire

Barnes & Thornburg
750 17th Street, NW, Suite 900
Washington, DC 20006

Attorneys for Plaintiffs
Allied Erecting and Dismantling, Inc.
Allied Industrial Development Corporation

(J1349507.1)

IN THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO

ALLIED ERECTING AND DISMANTLING CO., INC., et al.,	:	2006 CV 00181
	:	Hon. Maureen A. Sweeney
Plaintiffs,	:	
v.	:	
THE OHIO CENTRAL RAILROAD SYSTEM, et al.,	:	
Defendants.	:	

PLAINTIFFS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS DIRECTED TO DEFENDANTS

Plaintiffs, Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation (collectively "Allied"), by and through their attorneys, Eckert Seamans Cherin & Mellott, LLC and Nadler Nadler & Burdman Co., LPA, submit their Second Set of Requests for Production of Documents Directed to Defendants, The Ohio Central Railroad System, Ohio Central Railroad, Inc., Ohio & Pennsylvania Railroad Company, The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company, and The Mahoning Valley Railroad Company (collectively referred to herein as "Defendants"). Allied hereby requests that Defendants produce and permit the inspection and photocopying of the requested documents within thirty (30) days from the date of service hereof at the offices of Eckert Seamans Cherin & Mellott, LLC, U.S. Steel Building, 600 Grant Street, 44th Floor, Pittsburgh, Pennsylvania 15219 or at such other location and time as may be agreed upon by the parties.

INSTRUCTIONS

The following instructions will apply to these discovery requests:

1. In responding to these discovery requests, Defendants are requested to furnish all documents known or available to them, regardless of whether such information and documents are directly in its possession or that of its employees, agents, representatives, attorneys or experts.

2. If any of the discovery requests cannot be answered fully and completely, Defendants shall respond to the extent possible, specify the reasons for the inability to answer the remainder, and state the substance of their knowledge, information and belief concerning the subject matter of the unanswered portion.

3. Any incomplete or evasive answers or responses to these discovery requests shall be deemed a failure to respond.

4. Wherever appropriate in these discovery requests, the singular form of a word shall include its plural.

5. Whenever a masculine pronoun or possessive adjective appears, reference is made to both male and female persons, as appropriate.

6. These discovery requests shall be deemed continuing so as to require supplemental responses if Defendants or anyone on their behalf obtain(s) documents between the time the responses are served and the time of trial.

7. In responding to these discovery requests, Defendants are requested to produce the original documents as they are kept in the usual course of business or organize and label them to correspond with categories in these discovery requests.

8. In each instance where Defendants are asked to identify a person, please state with respect to each such person:

(a) His or her full name and all other names by which he or she may be known;

(b) His or her current business address and telephone number or, if unknown, his or her last known business address and telephone number;

(c) His or her present residential address and telephone number or, if unknown, his or her last known residential address and telephone number; and

(d) His or her present occupation, position and business affiliation or, if unknown, his or her last known occupation, position and business affiliation.

9. Any documents that Defendants refuses to produce at this time should be identified by stating the following information regarding each document:

(a) A description of the document;

(b) The subject matter of the document;

(c) The author of the document and the names of those persons identified to receive the documents;

(d) The date of the document; and

(e) The basis under which the document is being withheld.

10. If any document described herein was, but no longer is, within Defendants' possession, custody or control, please state in detail the following:

(a) A summary of the contents of the document;

(b) What disposition was made of it;

(c) The date of such disposition;

(d) Whether the original or a copy thereof is within the possession, custody or control of any other person; and

(e) If the answer to (d) is in the affirmative, the identity of that person.

11. Documents should be produced with an appropriate indication as to the paragraph under which they are being produced.

DEFINITIONS

"Allied" refers to Allied Erecting & Dismantling Co., Inc. and Allied Industrial Development Corporation.

"Allied's Property" refers to the real property, including all structures and improvements thereon, located at 2100 Poland Avenue, Youngstown, Ohio 44502.

"Any" shall be understood to include and encompass "all."

"Associated Railroads" shall collectively refer to the various named defendants that are among the individual railroads comprising The Ohio Central Railroad System, including Ohio & Pennsylvania Railroad Company, The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company, and The Mahoning Valley Railroad Company.

"Defendants" shall collectively refer to The Ohio Central Railroad System, Ohio Central Railroad, Inc., Ohio & Pennsylvania Railroad Company, The Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company, and The Mahoning Valley Railroad Company.

As used herein, the term "describe in detail" means to describe fully by reference to underlying facts and to particularize as to date, place, and identity of persons involved.

As used herein, the word "document" means any kind of written or graphic matter, however produced or reproduced, of any kind or description, whether sent or received or neither,

and whether printed, recorded, stored on disk, hard drive, drum, or cassette, including originals, copies and drafts and both sides thereof, and including but not limited to letters, emails, photographs, objects, correspondence, telegrams, cables, telex messages, memoranda, notes, notations, work papers, transcripts, minutes or reports of telephone or other conversations or of interviews, conferences, directors' meetings, inter- or intra-office communications, inter- or intra-departmental communications, resolutions, certificates, opinions, reports, studies, analyses, evaluations, contracts, licenses, agreements, ledgers, journals, books or records of account, summaries of accounts, balance sheets, interim statements, budgets, receipts, invoices, desk calendars, appointment books, diaries, lists, tabulations, summaries, sound recordings, computer tapes, microfilms, magnetic tapes, punch cards, all other records kept by electronic, photographic, xerographic, or mechanical means, and items similar to any of the foregoing, however denominated by Defendants.

"LTV Easement" refers to the easement agreement, dated May 6, 1993, by which Allied granted, *inter alia*, a perpetual, non-exclusive railroad easement to LTV Steel Company, Inc., which is attached to Allied's Complaint as Exhibit 1.

As used herein, the word "main line" means track that is used for through trains or is the principal artery of the system from which branches, yards, and spurs are connected.

"P&LE Easement" refers to the easement agreement, dated September 17, 1993, by which Allied granted, *inter alia*, a perpetual, non-exclusive railroad easement to Pittsburgh & Lake Erie Properties, Inc., which is attached to Allied's Complaint as Exhibit 2.

As used herein, the term "relating to" includes, without limitation, concerning, constituting, referring to, alluding to, responding to, connected with, commenting upon, in respect to, about, regarding, discussing, showing, describing, reflecting, or analyzing.

As used herein, the word "running track" means track reserved for movement through a rail yard.

As used herein, the word "spur" means a stretch of track that branches off the main line.

As used herein, the word "storage track" means track on which railcars are placed when not in service or awaiting disposition

As used herein, the word "switching station" means a track structure with movable rails to divert railcars from one track to another.

As used herein, the word "transfer point" means a track structure where bulk material is transferred between railcars.

REQUESTS FOR PRODUCTION

1. Any documents pertaining to Defendants' acquisition of tracks, land or other property or property rights from Gordon Neuenschwander, Pittsburgh & Lake Erie Properties, and/or the Pittsburgh and Lake Erie Railroad.

RESPONSE:

2. Any documents pertaining to the lease or purchase of tracks, land, or other property or property rights by and between Defendants and LTV Steel.

RESPONSE:

3. Any documents pertaining to Defendants' "common carrier" license from the Surface Transportation Board to operate over the "LE&E main line" and/or the "P&LE main line."

RESPONSE:

4. Any documents pertaining to Defendants' operation of The Youngstown & Southern Railway or The Youngstown and Southern Railroad.

RESPONSE:

5. Any "notice to cease operations" filed by Defendants regarding the operation of the "LE&E main line" and/or the "P&LE main line."

RESPONSE:

6. Any documents pertaining to Defendants' sale of property and/or property rights to Bill Marsteller, Gearmar Properties, Inc. and/or Maverick Tube.

RESPONSE:

7. Any documents pertaining to either Defendants' purchase of the "Struthers Lead" from P&LE, or the purchase agreement for the "Struthers Lead" with P&LE.

RESPONSE:

8. Any documents pertaining to Defendants' acquisition of rights to operate over the Youngstown and Southern Railroad.

RESPONSE:

9. Any documents pertaining to the sale of Summitview, Inc. and/or Defendants which reflect the property rights owned, possessed, held, or otherwise enjoyed by Defendants at the time of the sale to The Genesee and Wyoming Railroad.

RESPONSE:

10. Any documents pertaining to the purchase and subsequent sale of LTV Steel property by Defendants, including any retention of easements or other property rights by Defendants.

RESPONSE:

11. Any documents pertaining to the volume of rail traffic in the Youngstown Division of the Ohio Central Railroad System from 1997 through the present time.

RESPONSE:

12. Any documents pertaining to the rates or costs, including demurrage fees, charged by or to Defendants in connection with the staging, storing, parking, switching or other movement of rail cars from 1997 through the present time.

RESPONSE:

13. Produce for inspection each computer used by Rick McCracken, Terry Feichtenbiner and William Strawn in the scope of their employment with Defendants, whether laptop or desktop computer, or file server; and copies of all floppy discs, CDs, DVDs, and/or backup tapes of any of these computers, for the purpose of creating full forensic bit stream mirror images of same.

RESPONSE:

14. Produce for inspection each computer that contains any data regarding the location, frequency and number of rail cars on rail lines covered by the LTV Easement and/or the P&LE Easement, whether laptop or desktop computer, or file server; and copies of all floppy discs, CDs, DVDs, and/or backup tapes of any of these computers, for the purpose of creating full forensic bit stream mirror images of same.

RESPONSE:

Respectfully submitted,

Christopher R. Opalinski, Esquire
Pa. I.D. No. 35267
F. Timothy Grieco, Esquire
Pa. I.D. No. 81104
Jacob C. McCrea, Esquire
Pa. I.D. No. 94130

Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219
(412) 566-5963
Fax: (412) 566-6099

Jay M. Skolnick, Esquire
No. 0006767
Robert S. Hartford, Esquire
No. 0020067
Nadler Nadler & Burdman Co., LPA
20 Federal Plaza West, Suite 600
Youngstown, OH 44503- 1423
(330) 744-0247

Fax: (330) 744-8690

Attorneys for Plaintiff, Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation

Date: May 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Second Set of Requests for Production of Documents Directed to Defendants was served by first-class mail, this 12th day of May, 2009, as follows:

C. Scott Lanz, Esquire
Thomas Lipka, Esquire
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, OH 44503

Jacob C. McCrea

Jacob C. McCrea

Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219

Attorneys for Plaintiffs
Allied Erecting and Dismantling Co., Inc.
Allied Industrial Development Corporation

ECKERT SEAMANS

Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

TEL 412 566 6000
FAX 412 566 6099
www.eckertseamans.com

Jacob C. McCrea
412.566.6110
jmccrea@eckertseamans.com

file copy

May 12, 2009

Thomas J. Lipka, Esq.
Manchester · Bennett · Powers & Ullman
Atrium Level Two
The Commerce Building
201 E. Commerce St.
Youngstown, OH 44503

Re: Allied Erecting and Dismantling Co., Inc., et al. v.
The Ohio Central Railroad System, et al.; 2006 CV 00181

Dear Mr. Lipka:

As a follow-up to the depositions of Messrs. Strawn and Feichtenbiner, I am asking that you produce the following documents, which were mentioned at their depositions. With respect to the deposition of Mr. Strawn, please produce the following:

1. The April 9, 1993 Lease between The Youngstown & Southern Railway and PL&W Railroad (p. 53);

2. Any documents pertaining to the acquisition of rights over the P&LE / LE&E main line from ConRail (p. 62);

3. The remainder of the agreement to which Exhibit 7 relates (p. 70); and,

4. Any documents pertaining to Ohio Central taking over the "operating lease" for the P&LE / LE&E main line from PL&W (p. 115).

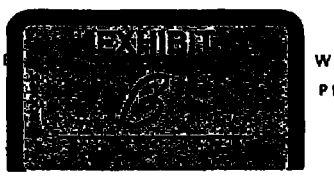
With respect to the deposition of Mr. Feichtenbiner, please produce the following:

1. Any documents pertaining to Ohio Central's ownership of a section of the P&LE / LE&E main line from milepost 0 and running east (toward or across Allied's property) (p. 35);

2. Any documents pertaining to Ohio Central's "arrangement" with the Youngstown & Southeastern Railroad for the use of Ohio Central's tracks (p. 35, 42); and

3. The easement or other document identified by Mr. Feichtenbiner at page 70 of his deposition.

In the event you believe that any of the foregoing requests are beyond the scope of our prior document request, please advise me and I will immediately issue another formal document request.



ECKERT SEAMANS

Please contact me if you have any questions.

Very truly yours,

Jacob C. McCrea

Jacob C. McCrea
JCM/jar

cc: Mr. John Ramun
Christopher R. Opalinski, Esq.
F. Timothy Grieco, Esq.

bcc. Jay Skolnick
Ed Smith

F. T Grieco/ESCM
09/01/2009 05:22 PM

To "Thomas J. Lipka" <TLipka@mbpu.com>
cc Jacob C McCrea/ESCM@ESCM
bcc
Subject Re: Allied

Tom: Please advise re: the status of discovery answers and your document production (hopefully including the docs identified by Craft, i.e., Track Master, etc.) Also, please advise of dates in Sept. when we can take Terry's deposition. Unless you tell me otherwise, I am assuming you can produce him. Jake will be contacting you about deposing Bryan Freeman and Rick McCracken. Thanks.

Tim

F. Timothy Grieco, Esquire
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
Tel: 412-566-2070
Fax: 412-566-6099
Email: tgrieco@eckertseamans.com
www.escm.com

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

ALLIED ERECTING AND DISMANTLING CO., INC., Plaintiffs, v. THE OHIO CENTRAL RAILROAD, INC., et al., Defendants.	)	CASE NO. 2006 CV 00181 JUDGE MAUREEN A. SWEENEY **AFFIDAVIT OF TERRY FEICHTENBINER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES, Terry Feichtenbiner (hereinafter "Affiant"), and being first duly sworn, deposes and says as follows:

1. I, Terry Feichtenbiner (hereinafter "Affiant"), have personal knowledge of the facts set forth in this Affidavit.

2. Summitview, Inc. is an Ohio corporation which through October of 2008 wholly owned eleven Ohio corporations engaged in railroad operations in Ohio and Pennsylvania.

3. Ohio Central Railroad, Inc., Ohio & Pennsylvania Railroad Company, Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., Youngstown Belt Railroad Company, and Mahoning Valley Railway Company (hereinafter "Defendants"), were six of the Ohio corporations wholly owned by Summitview, Inc.

4. I am currently the General Manager, of the Youngstown Division of the Ohio Central Railroad, Inc.

5. Each of the above named Defendants are Class III rail carriers registered with the Surface Transportation Board.

6. Each of the above named Defendants engage in interstate commerce.

EXHIBIT
A

EXHIBIT
D

7. The Defendants acquired the rights to an easement for use of railroad tracks over certain real property owned by Plaintiff Allied Industrial. This Easement is identified as the LTV Easement in Plaintiff's Amended Complaint.

8. The Defendants acquired the rights to an easement for the use of railroad tracks over certain real property owned by Plaintiff Allied Erecting. The Easement is identified as the P & LE Easement in Plaintiff's Amended Complaint

9. The use of the above easements by any of the Defendants was and is in furtherance of Interstate Commerce.

FURTHER AFFIANT SAYETH NAUGHT.

Date: _____

Terry Feichtenbiner (Signature)

STATE OF OHIO)
) SS:
COUNTY OF Mahoning)

Sworn to before me and subscribed in my presence this 14 day of April, 2009.

Notary Public

THOMAS J. LIPKA, ATTORNEY AT LAW
Notary Public-State of Ohio
My Commission Has No Expiration Date

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

ALLIED ERECTING AND DISMANTLING CO., INC., et al	)	CASE NO. 2006 CV 00181
Plaintiffs	)	JUDGE MAUREEN SWEENEY
vs.	)	**SUPPLEMENTAL AFFIDAVIT OF DAVID COLLINS**
THE OHIO CENTRAL RAILROAD SYSTEM, et al.	)	
Defendants	)	

Now comes the affiant, David Collins, having first been duly sworn, who deposes and says:

1. I am the Senior Vice President of the New York, Pennsylvania and Ohio Region of the Genesee & Wyoming Inc. In that capacity, I am in charge of the Youngstown Division of the Ohio Central Railroad System.

2. This Affidavit is to supplement the Affidavit previously filed by Terry Feichtenbiner in Support of Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board.

3. The Plaintiffs in this case are requesting that the Court order the Defendants to cease any storage or staging of railcars on certain tracks which traverse real property owned by the Plaintiffs. The Defendants have stored railcars on these tracks in the past and have need to continue to store cars on these lines. Storage of railcars on tracks is a necessary and common practice in the railroad industry.

EXHIBIT

EXHIBIT
tabbies
A

4. As stated in the previous Affidavit, the easements at issue are used by Defendants in interstate rail commerce. Forcing the Defendants to cease the storage of railcars, upon demand of Plaintiff, or pay for the right to store railcars, would negatively affect the Defendants' use of the rail lines in question and would greatly interfere with the Defendants interstate rail operations.

AFFIANT FURTHER SAYETH NAUGHT.

Dated: 8/25/09

David Collins

STATE OF OHIO)
Coshocton) ss:
COUNTY OF ~~MAHONING~~)

Sworn to and subscribed before me this 25 day of August, 2009.

Notary Public
My commission expires on:

Kimberly R. Wright
Notary Public, State of Ohio
My Commission Expires
July 17, 2013

IN THE COURT OF COMMON PLEAS OF
MAHONING COUNTY, OHIO

ALLIED ERECTING AND DISMANTLING CO., INC., et al.,	:	Case No. 2006 CV 00181
	:	Judge Maureen A. Sweeney
Plaintiffs,	:	
	:	Magistrate Judge Dennis J. Sarisky
v.	:	
THE OHIO CENTRAL RAILROAD SYSTEM, et al.,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE REFER TO THE SURFACE TRANSPORTATION BOARD

Plaintiffs, Allied Erecting & Dismantling Company, Inc. and Allied Industrial Development Corporation ("Plaintiffs" or "Allied"), by their attorneys, and submit this Memorandum in Opposition to Defendants' Motion to Dismiss or in the Alternative Refer to the Surface Transportation Board.

BACKGROUND

This action concerns whether The Ohio Central Railroad System ("Ohio Central")[1] has breached two (2) voluntary easement agreements allowing non-exclusive passage over railroad tracks which run through Plaintiffs' property.[2] Specifically, Allied complains that Ohio Central

[1] Allied's Amended Complaint names six (6) separate railroads which, along with other railroads, comprise The Ohio Central Railroad System. Allied will refer to the defendants collectively as "Ohio Central."

[2] Allied and Ohio Central own adjacent parcels of property along Poland Avenue in the City of Youngstown.

is intentionally and improperly parking rail cars (including uncovered rail cars containing waste and debris) on Allied's property in a manner that is inconsistent with, and in violation of, the perpetual, non-exclusive LTV and P&LE Railroad Easements (collectively the "Railroad Easement Agreements") that govern Ohio Central's use of the tracks on Allied's property.[3]

Allied's Amended Complaint states four (4) causes of action: (1) the misuse, abuse, and/or overburdening of these non-exclusive railroad easements (Compl. ¶¶ 20-23); (2) the unreasonable use of these easements (Compl. ¶¶ 24-27); (3) unjust enrichment and deprivation of property (Compl. ¶¶ 28-32); and (4) trespass ab initio (Compl. ¶¶ 33-38). Each of these claims relates to Ohio Central's improper and unilateral decision to treat the railroad tracks on Allied's property as its own, in violation of the Railroad Easement Agreements. Allied's Complaint does not assert claims arising from Ohio Central's interstate railroad operations and does not seek to otherwise restrict Ohio Central's use of rail lines in connection with such operations. Allied takes issue with only a specific localized act: Ohio Central's impermissible misuse and abuse of private easement rights granted by Allied, which causes direct injury to Allied and its interests.

LAW AND ARGUMENT

Ohio Central belatedly[4] contends that Allied's claims are preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 et seq.[5]

---

[3] Based upon information revealed in discovery, Ohio Central's right to operate over the "P&LE" tracks pursuant to the P&LE Easement Agreement has lapsed. Consequently, Allied does not concede that Ohio Central presently has any rights to operate over the "P&LE" tracks.

[4] The timing of Ohio Central's Motion is perplexing given that this case (was wrongfully removed by Ohio Central and) was remanded to this Court on October 13, 2006 – over two and a half years ago.

[5] The ICCTA, which was enacted in 1995, abolished the Interstate Commerce Commission and established the Surface Transportation Board ("STB") as the federal agency with jurisdiction over certain aspects of rail transportation. See generally Railroad Ventures, Inc. v. Surface Transportation Board, 299 F.3d 523 (6th Cir. 2002).

However, as explained below, numerous federal courts and the federal Surface Transportation Board ("STB") have held that state law claims under easement agreements are not preempted by ICCTA and are to be interpreted and enforced by applying state law.

A. The ICCTA Preemption Statute

Defendants contend that Plaintiffs' claims are preempted by the ICCTA. The ICCTA provision which assigns jurisdiction over the regulation of rail transportation to the Surface Transportation Board states as follows:

> (b) The jurisdiction of the Board over—
>
> (1) transportation by rail carriers; and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part [49 USCS §§ 10101 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

"The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers ..." Florida East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324, 1337 (11th Cir. 2001) (emphasis in original).[6]

[6] As the Eleventh Circuit Court of Appeals has observed, the legislative history of the ICCTA preemption provision makes it clear that laws which "do not generally collide with the scheme of [federal] economic regulation (and deregulation) of rail transportation ..." are not preempted. Florida East Coast Ry., 266 F.3d at 1338-39.

ICCTA, therefore, "preempts all state laws that may reasonably be said to have the effect of *managing or governing rail transportation*, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008) (emphasis added). Allied's claims clearly fall into the latter category.

"The STB has articulated a comprehensive test for determining the extent to which a particular state action or remedy is preempted by § 10501(b)." Id. Courts follow the STB's approach to analyzing preemption issues "because the STB was authorized by Congress to administer [ICCTA] and is therefore uniquely qualified to determine whether state law should be preempted by [ICCTA]." Id.; New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 331 (5th Cir. 2008).

As the United States Court of Appeals for the Sixth Circuit recently explained, "[t]he STB's preemption analysis distinguishes between two types of preempted state actions or regulations, those that are categorically preempted and those that are only preempted as applied." Village of Blissfield, 550 F.3d at 539-40. State actions are "categorically" or "facially" preempted where they "would directly conflict with exclusive federal regulation of railroads." Id. at 540. Federal courts and the STB have recognized "two broad categories of state and local actions that are categorically preempted regardless of the context of the action: (1) any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized; and (2) state or local regulation of matters directly regulated by the Board - such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service." Id. Because these categories

of state regulation are "*per se* unreasonable interference with interstate commerce, the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself." Id.

Those state actions that do not fall into one of the above categories may be preempted *as applied:* "For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." Id.

B. Allied's Claims Are Not Categorically or Facially Preempted By ICCTA

Allied's claims, on their face, do not fit the first category of facially preempted action. This lawsuit is simply not a "form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized." Id. at 540. No state or local permits or preclearance procedures are at issue in this lawsuit. Similarly, this lawsuit does not involve "state or local regulation of matters directly regulated by the [STB] - such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service." Id. Allied's claims are simply an effort to enforce the private easement rights that were granted to the predecessors of Ohio Central to pass over Allied's property.

In PCS Phosphate Company, Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009), the United States Court of Appeals for the Fourth Circuit held that judicial enforcement of an easement granted by a landowner to the predecessors in interest of the railroad is not preempted by the ICCTA "because it is not the sort of rail 'regulation' contemplated by the statute and, as a voluntary agreement, does not 'unreasonably interfere' with rail transportation."

PCS Phosphate, 559 F.3d at 214. In this case, predecessors to the owners of a phosphate mine, granted an easement to a predecessor railroad to construct a rail line over the mine property. Id. at 215. The easement contained a covenant whereby the railroad agreed to relocate the rail line, at its expense, if the mine owners deemed relocation to be necessary to mine operations. Id. Many years later, the mine owners determined that mining under the rail line was necessary, and requested the railroad to relocate the rail line pursuant to the easement. Id. at 216. After the railroad refused to relocate the rail line, the mine owners relocated the line at their own expense and sued the railroad to recover their expenses. Id.

On appeal, the U.S. Court of Appeals held (as did the district court) that the enforcement of the easement was not preempted by the ICCTA, and rejected an overly broad construction of the ICCTA preemption clause. First, the court observed that ICCTA's preemption clause "focuses specifically on regulation," and that "Congress narrowly tailored the ICCTA preemption provision to displace only regulation, i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Id. at 218. The court's further analysis is instructive on what is and is not preempted by ICCTA:

> Voluntary agreements between private parties, however, are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of "regulation" expressly preempted by [ICCTA]. If contracts were by definition "regulation," then enforcement of every contract with "rail transportation" as its subject would be preempted as a state law remedy "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Given the statutory definition of "transportation," this would include all voluntary agreements about "equipment of any kind related to the movement of passengers and property, or both, by rail." See 49 U.S.C. § 10102(9) (defining "transportation"). **If enforcement of these agreements were preempted, the contracting parties' only recourse would be the "exclusive" ICCTA remedies. But the ICCTA does not include a general contract remedy.** Such a broad reading of the preemption

> clause would make it virtually impossible to conduct business, and Congress surely would have spoken more clearly, and not used the word "regulation," if it intended that result.

Id. at 218-19 (emphasis added).[7]

The court went on to review the legislative history of ICCTA, which makes clear that the intent of Congress was simply to preempt "State *economic regulation* of railroads," not to preempt enforcement of "all voluntary agreements about rail transportation." Id. at 220 (emphasis in original). As the court observed, "[t]he STB itself has emphasized that courts, not the STB, are the proper forum for contract disputes, even when those contracts cover subjects that seem to fit within the definition of 'rail transportation.'" Id. (citing The N.Y., Susquehanna & W. Ry. Corp. – Discontinuance of Service Exemption, 2008 WL 4415853 (STB Sept. 30, 2008)).

Like the landowner in PCS Phosphate, Allied's claims seek to enforce the terms of private easements it granted to predecessors in interest of the railroad. As in PCS Phosphate, here there is no attempt to impose any economic regulation on Ohio Central. Moreover, as the court observed, ICCTA does not contain a general remedy or cause of action for breaches of easements or other contractual agreements with railroads. PCS Phosphate, 559 F.3d at 219. Consistent with the STB's position on the proper forum for contract-type disputes, the lack of a remedy in ICCTA demonstrates that ICCTA does not facially or expressly preempt Allied's claims, and that courts of law are the proper forum to resolve these disputes.

---

[7] It is worth mentioning that typically railroad "[c]rossing disputes, despite the fact that they touch the tracks in some literal sense, ... do not fall into the category of 'categorically preempted' or 'facially preempted' state actions." Barrios, 533 F.3d at 333; see also id. ("Routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc. are not preempted so long as they would not impede rail operations or pose undue safety risks."). Such easement disputes are not preempted despite the fact that the rail lines at issue are almost certainly used in interstate commerce.

C. Allied's Claims Do Not Prevent or Unreasonably Interfere With Railroad Transportation, and Therefore Are Not Preempted As Applied

Allied's claims are likewise not preempted under the STB's "as-applied" preemption analysis. "[T]he touchstone [of this analysis] is whether the state regulation imposes an unreasonable burden on railroading." Village of Blissfield, 550 F.3d at 541. The STB has found that a state regulation is permissible as long as "(1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads." Id.

Regarding the unreasonable burden prong, "the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion," and "the regulation must be settled and definite enough to avoid open-ended delays." Id. This analysis "requires a factual assessment of the effect of providing the claimed remedy." PCS Phosphate, 559 F.3d at 221.

To pass the non-discrimination prong, a state regulation "must address state concerns generally, without targeting the railroad industry." Village of Blissfield, 550 F.3d at 541. States retain their police powers, allowing them to create health and safety measures, but "those rules must be clear enough that the rail carrier can follow them and ... the state cannot easily use them as a pretext for interfering with or curtailing rail service." Id.[8]

As stated by the Fourth Circuit in PCS Phosphate, "the factual assessment is simple because the remedy sought is enforcement of a voluntary agreement." Id.[9] "As the STB has recognized, voluntary agreements must be seen as recognizing the carrier's own determination

[8] There is also a "presumption that areas of law traditionally reserved to the states, like police powers or property law, are not to be disturbed absent the clear and manifest purpose of Congress." Barrios, 533 F.3d at 334.

[9] Unlike state or local laws or regulations, Ohio Central is (or was) a voluntary party to the easements at issue in this case, and is free to attempt to renegotiate the terms thereof.

and admission that the agreements would not unreasonably interfere with interstate commerce." Id. (citing Township of Woodbridge, infra, and Pejepscot, infra). Furthermore, Ohio Central has provided no factual basis for any finding that the relief sought by Allied would unreasonably interfere with interstate commerce. To the contrary, they have submitted the conclusory affidavit of Terry Feichtenbiner, which says nothing about how the relief sought by Allied would unreasonably interfere with interstate commerce. See Defendants' Memorandum, Exhibit A. Thus, Ohio Central has failed to meet its burden of establishing an unreasonable interference with interstate commerce. This is exactly what Judge Economus found when the issue of ICCTA preemption was briefed while the case was removed to the Northern District of Ohio: "[A]side from these conclusory statements [that Allied's claims were clearly federal in nature and seek to regulate Defendants' use of rail lines], **Defendants have not demonstrated to this Court that the enforcement of the LTV and PLE Easement Agreements would impermissibly interfere with interstate rail operations."** Allied Erecting & Dismantling Co., Inc. et al. v. Ohio Central Railroad, et al., Case No. 4;06cv509, p. 8 (N.D. Oh. Oct. 11, 2006) (emphasis added).

Finally, this lawsuit obviously does not concern state rules which attempt to regulate the railroad industry; it is simply an action to enforce private, voluntary easement rights granted by Allied to predecessors of Ohio Central in order to allow passage over Allied's property. For these reasons, there is no aspect of Allied's claims which is preempted under ICCTA's "as applied" preemption analysis.

D. ICCTA Preemption Does Not Permit a Railroad to Avoid its Voluntary Contractual Commitments

Ohio Central asserts that ICCTA preempts all "civil actions brought in state court by private parties seeking equitable or monetary relief based on state common law." Defendants' Memorandum at 11. This contention is misleading. While in several cases courts have found

that ICCTA preempts state common law claims, state statutes and local ordinances with respect to rail operations, see, e.g. Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 444 (5th Cir. 2001), the present case is easily distinguishable from these cases in that Allied's state common law claims arise out of voluntary contractual obligations bargained for in an arms-length transaction, i.e., the Railroad Easement Agreements.

As mentioned above, the Surface Transportation Board ("STB") has held that a party to a contract cannot escape its voluntary contractual commitments by invoking the preemptive effect of § 10501 of ICCTA. Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served December 1, 2000), clarified (STB served March 23, 2001), and available at 2000 STB LEXIS 709, 2000 WL 1771044 and 2001 STB LEXIS 299, 2001 WL 283507, respectively. In Woodbridge, a railroad company entered into a valid and enforceable agreement curtailing the "idling of locomotives and switching of rail cars . . . between 10:00 p.m. and 6 a.m." as part of a settlement of a lawsuit filed by the Township of Woodbridge (the "Township"). 2000 WL 1771044, *1. The Township later filed an action with the STB seeking a declaration that Conrail was bound by the settlement agreement, and that the settlement agreement could be enforced in federal or state courts. Id. The STB agreed with the Township. Id. at *3-4. In declining to rule on the merits of the contract disputes involved, the STB noted that while regulatory action that affected railroad operations was preempted, commitments entered into by way of voluntary contracts are not. Id. at *3. The STB further declined to consider preemption issues that "would have been involved" if the case were one of legislative regulation. Id. Such voluntary agreements, the STB indicated, could be seen as indicating the railroad's own "determination and admission that the agreements would not unreasonably interfere with interstate commerce." Id.

Similarly, in Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., the United States District Court of Maine explained:

> In its initial decision, the STB concluded that a rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot use the preemptive effect of section 10501(b) to shield it from its own commitments, provided that the agreement does not unreasonably interfere with interstate commerce. In clarifying that earlier decision, the STB subsequently noted that a rail carrier that enters into such agreements is not precluded from arguing "as a matter of contract interpretation that: (1) unreasonable interference with interstate commerce would result if these voluntary agreements are interpreted [in the manner sought by the plaintiff], and (2) in considering enforcement, the court should give due regard to the impact on interstate commerce."

297 F. Supp. 2d 326, 330, 332-333 (D. Me. 2003) (internal citations omitted).

The court in Pejepscot held that the plaintiff's breach of contract claim was not preempted by ICCTA and, therefore would not be dismissed. Id. at 333. See also Pejepscot Industrial Park, Inc. – Petition for Declaratory Order, STB Finance Docket No. 33989, 2003 STB LEXIS 253 (STB served May 15, 2003) ("[W]e in the past determined that a carrier cannot invoke the preemption provisions of 49 U.S.C. 10501(b) to avoid its obligations under a presumably valid and otherwise enforceable agreement that it has entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce."); see also CSX Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34662 n. 14, 2005 STB LEXIS 134 n. 14 (STB served March 14, 2005). Furthermore, the STB defers to the courts on matters of contract interpretation. See e.g., Ohio Valley Railroad Company – Petition to Restore Switch Connection and Other Relief, STB Finance Docket No. 34608, 2005 STB LEXIS 117 (STB served February 23, 2005) (citing The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc., STB Docket No. 42053, slip op. at 5 (STB served Dec. 1, 2000); Kansas City Terminal Railway Company and the Atchison, Topeka and Santa Fe

Railway Company -- Contract to Operate Exemption -- In Kansas City, MO, STB Finance Docket No. 32896, slip op. at 3-4 (STB served Nov. 20, 1996)).

In this case, as in Pejepscot and PCS Phosphate, supra, Allied and Ohio Central are (or were) parties to a pair of private railroad easements that were voluntarily negotiated at arms length. Under the STB's own standard, Ohio Central should not now be allowed to invoke the preemptive effect of § 10501 of ICCTA in order to escape its own contractual obligations. Furthermore, Ohio Central cannot establish that these state law claims - which merely seek to enforce voluntarily-entered easement agreements - unreasonably burden interstate commerce. This is especially true because these claims only seek to limit Ohio Central to those tracks and uses to which it is legally entitled to occupy and use under the railroad easement agreements. These railroad easement agreements are no more intrusive than the agreement in Woodbridge which expressly limited railroad operations, or the easement in PCS Phosphate, which required the railroad to relocate a rail line, at its own expense, upon request of the landowner. The STB and the courts have repeatedly determined that such claims are not preempted and should be left for judicial determination.[10] Therefore, Defendants' Motion to Dismiss should be denied.

E. Case Law Cited by Ohio Central is Distinguishable

In its Memorandum in Opposition, Ohio Central cites several cases for the specific proposition that ICCTA preempts state law claims alleging the misuse or abuse of railroad easements. Far from bearing a "remarkable resemblance" to the case at bar, Defendants'

[10] Notably, Allied and Ohio Central litigated a previous dispute in the Court of Common Pleas of Mahoning County at Civil Action No. 00 CV 1441. In that case, Allied sued Ohio Central to recover for damages caused to the "P&LE" tracks when one of Ohio Central's rail cars derailed while passing over the line. Significantly, Ohio Central never contended that Allied's claims, which were based on Ohio Central's easement-based duty to repair any damage it caused to the tracks, were barred by ICCTA.

Memorandum at 12, these cases are factually and legally distinguishable and do not support preemption of the claims presented in this case.

For example, Ohio Central cites Maynard v. CSX Transp., Inc., 360 F.Supp.2d 836 (E.D. Ky. 2004), as an instance where ICCTA preempted claims against a railroad company for misuse/abuse of a railroad easement. Maynard involved claims that CSX "wrongfully, negligently, and carelessly" blocked access to three residences by stopping rail cars on a side track for excessive amounts of time. Id. at 838. Plaintiffs argued that this blockage caused them undue hardships, diminished the value of their property and permitted drainage from adjoining properties to further diminish the value of their property. Id.

While Ohio Central's Memorandum correctly states that the court in Maynard dismissed plaintiffs' case, Ohio Central fails to accurately convey the legal basis for this decision. The Maynard court did not rule that misuse or abuse of railroad easement claims are preempted by ICCTA. Instead, it was decided that the claims asserted in Maynard amounted to negligence and nuisance claims and, as such, those claims were preempted. Id. at 841-43. The court based its determination that the claims were actually based in tort on several factors, including: (1) that the allegations of the complaint were couched in terms of negligence and nuisance; (2) that the prayer for relief requested relief beyond that which is normally available for breach of an agreement; and (3) plaintiff's discovery responses belied the fact that the claims were not based in terms of a breached mutual obligation, but sought redress for tortuous behavior that caused injury to the plaintiffs. Id. at 841. Therefore, the court's determination in Maynard is inapposite because the court found the plaintiff's claims were not based on a breach of an agreement at all, but on tortuous conduct. Moreover, all of the cases cited for support by the court in Maynard are

based on a recognition that various state law tort theories – not contract claims - that effectively attempt to "regulate" railroad operations may be preempted by ICCTA. Id. at 841-43.

The remaining cases cited in Ohio Central's Memorandum further demonstrate that the applicable case law does not support the extension of the "broad preemptive effect of ICCTA" to claims arising from voluntarily entered easement agreements. Indeed, none of these cases involved the breach of an agreement to which the railroad is a party. In Suchon v. Wisc. Cent. Ltd., No. 04-C-0379-C, 2005 U.S. Dist. LEXIS 4343 (W.D. Wis. Feb 23, 2005), the court held that "[a]llowing plaintiff to obtain a monetary or injunctive remedy by application of the state's nuisance laws to defendant's actions is not significantly different from allowing the state to impose restrictions on defendant through laws and regulations." Id. at 10 (emphasis added). The concern is that state regulation would cause defendant to be "restricted in the use of its property in derogation of the [ICCTA]." Id. That concern is not valid in the case of voluntarily entered easement agreements.

Similarly, in Rushing v. Kansas City S. Ry. Co., 194 F. Supp.2d 493, 498 (S.D. Miss. 2001), the plaintiff alleged only common law claims of nuisance and negligence with regard to Kansas City Southern's use of its own switchyard. In addition to ruling that certain of the nuisance and negligence claims were preempted due to the "potential interference with interstate railroad operations" by the state, the court found that the construction/design of a berm intended to reflect and absorb noise from the yard did not directly relate to defendant's railroad operations. Id. at 501. The Rushing court further stated that "an order by the Court directing the Defendant to compensate and correct drainage problems resulting from the construction of the berm would not implicate the type of economic regulation Congress was attempting to prescribe when it enacted the ICCTA." Id. Consequently, the claim relating to the construction and design

of the berm was not dismissed. This directly supports Allied's position that actions not related to interstate railroad operations are not the type of "operations" preempted by ICCTA. The Rushing court held this to be the case even where the cause of action was based in tort law, which has sometimes been deemed sufficiently akin to state regulation to warrant ICCTA preemption. Claims arising from voluntarily entered obligations have not been treated in this manner because such obligations do not present the dangers associated with state regulation, and by their very nature, involve an implicit admission by the railroad that there is no threat of "regulation" of its rail line operations.

Ohio Central also relies upon Friberg v. Kansas City S. Rr. Co., 267 F.3d 439, 443 (5th Cir. 2001). This case bears little resemblance to the present case. The full holding in that case states:

> Nothing in the ICCTA otherwise provides authority for a state to impose operating limitations on a railroad like those imposed by the Texas Anti-Blocking Statute, nor does the all-encompassing language of the ICCTA's preemption clause permit the federal statute to be circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions such as those pertaining to train length, speed or scheduling. We thus hold that the Texas Anti-Blocking Statute, as well as the Fribergs' common law claim of negligence, are preempted by the ICCTA.

Id. at 444 (emphasis added.). Friberg is a case addressing the preemptive effect of ICCTA on a state statute that directly interfered with a railroad company's ability to make efficient decisions regarding the operation of its business. As such, Friberg is completely inapplicable to the present case.[11]

[11] The cases of Cannon v. CSX Transportation, Inc., 2005 WL 77088 (Ohio App. 8th Dist.) and Guckenberg v. Wisconsin Central Ltd., 178 F. Supp. 2d 954 (E.D. Wis. 2001) are likewise distinguishable because they involved nuisance and negligence claims, rather than claims based on private easements granted by the plaintiffs/landowners.

In sum, the cases cited in Ohio Central's Motion in Opposition do not support the position that claims arising out of voluntarily-entered agreements are preempted by ICCTA, especially where the action complained of is not connected to Ohio Central's interstate railroad operations.

F. Railroad Easements Are Voluntary Contractual Agreements And Their Enforcement is Not Preempted By The ICCTA

Ohio case law commonly interprets and applies express easements in the same manner as contracts. In general terms, Ohio courts have described the nature of an easement as a "right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former." Yeager v. Tuning, 86 N.E. 657 (Ohio 1908). See also Harbor Island Assoc. v. Ottawa Regional Planning Commission, No. Ot-03-005, 2003 WL 22462503, at *3-4 (Ohio Ct. App. 2003). It is clear that an easement is an interest in land and is typically thought of as a nonpossessory, right of use in property. Columbiana Port Authority v. Boardman Township Park Dist., 194 F. Supp. 2d 1165, 1175 (N.D. Ohio 2001). However, Ohio courts regularly describe easements as contracts or imbue easements with "contract-like" properties. For example, in Beaumont v. FirstEnergy Corp., an owner of a parcel of land challenged a utility company's plan to cut down 100 trees around its power lines within an easement on the owner's property. No. 2004-G-2573, 2004 WL 2804801, at *1-2 (Ohio Ct. App. 2004). The opinion states, "[s]ince an easement is set forth in a written agreement, it must be interpreted in the identical manner as any other legal contract; i.e., the primary goal in construing the terms of an easement is to ascertain and enforce the intent of the parties." Id. at *4. The court then applied traditional rules of contractual interpretation to the express easement.

The Beaumont case is a recent example of Ohio precedent that expresses easements as contracts and interprets them as such. Gans v. Andrulis, a case examining the parameters of an access easement for a footpath and a dock on a lake, states that if the intent of the parties is "plain on the face of the instrument," then no rules of construction or parol evidence may be considered. Gans v. Andrulis, No. 99-P-0118, 2001 WL 530490, at *3 (Ohio Ct. App. 2001). If the easement "lacks a specific description in the instrument, or if it is ambiguous, then a court may look to other circumstances to determine the intent of the parties." Id. at *4. In Hinman v. Barnes, the Ohio Supreme Court held that a "Contract for Right of Way" was an easement for the Sandusky & Interurban Electric Railway Company. Hinman v. Barnes, 66 N.E.2d 911, 915 (Ohio 1946). Hunker v. Whitacre-Greer Fireproofing Company also treats an express easement as a contract, holding that an easement for hunting was "clear and unambiguous," and so the court could not "create a new contract by finding an intent not expressed in the clear language employed by the parties." 801 N.E.2d 469, 471 (Ohio Ct. App. 2003). Ohio courts continually use contract language when discussing express easements because the mutual obligations and controlling nature of the parties' intent support such treatment. Accordingly, the Railroad Easement Agreements at issue in this case are properly viewed and treated as voluntary contractual obligations of Ohio Central for purposes of an ICCTA preemption analysis.

G. The Relief Sought By Allied Does Not Compel a Finding of ICCTA Preemption

Ohio Central would also have this Court believe that because Allied is seeking injunctive relief its claims must be preempted because Allied seeks to have the Court "restrict, impair, or

impede" Ohio Central's use of the Railroad Easements. This argument not only mischaracterizes the law, but also the remedies sought by Allied.

In Woodbridge, the STB states:

> We need not consider preemption issues that would have been involved . . . had a court attempted to impose sanctions for violations of the agreements that are so onerous as to unreasonably interfere with railroad operations. . . . Moreover, Conrail has not shown that enforcement of its commitments would unreasonably interfere with the railroad operations. . . . [W]e believe that state and local regulation is permissible when it does not interfere with interstate railroad operations."

Woodbridge, 2000 STB LEXIS 709, *9-*10 (emphasis added). This STB opinion clearly establishes that it is not the type of remedy that determines whether the claim may be preempted, but the extent to which that remedy would unreasonably interfere with interstate railroad operations. Again, this concern is obviated when the limitation at issue is agreed to by the parties. Ohio Central's Memorandum cites PCI Trans., Inc. v. Fort Worth & W.R.R. Co., 418 F.3d 535 (5th Cir. 2005), for the proposition that injunctive relief regulates railroad operations and, therefore, is preempted by ICCTA. Defendants' Memorandum at 15. In PCI, however, the injunctive relief sought was extensive and reached far beyond the terms of the one-page written contract regarding a dispute over demurrage charges. PCI, 418 F.3d at 538. The requested relief would have directly impacted the railroad company's interstate operations by restraining rail car movements, delivery of cars carrying cargo, and demurrage charges. Id. As such, the relief sought directly attempted to regulate railroad operations and, therefore, was preempted by ICCTA. In the present case, Allied's request for injunctive relief seeks only that Ohio Central refrain from parking or storing rail cars on its rail lines in a manner inconsistent with the Railroad Easement Agreements. This case is entirely distinguishable from the PCI case, because

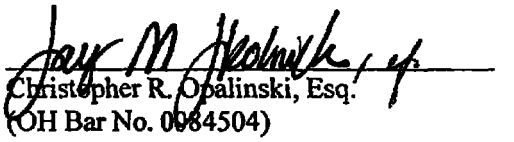
unlike the plaintiff's claims in PCI, Allied's claims only seek to enforce Ohio Central's compliance with the voluntary Railroad Easement Agreements.

Accordingly, Ohio Central's Motion to Dismiss should be denied because ICCTA preemption is inapplicable. The nonexclusive Railroad Easement Agreements at issue embody the private voluntarily entered obligations of the parties, and the impermissible parking of rail cars on Allied's property does not impact Ohio Central's interstate railroad operations in any manner. Furthermore, both the injunctive and monetary remedies Allied seeks are wholly within the realm of the voluntarily entered contracts. In sum, Allied's claims are clearly covered by the PCS Phosphate, Woodbridge and Pejepscot decisions and, therefore, are not preempted by ICCTA.

CONCLUSION

Based on all of the foregoing reasons and authorities, plaintiffs Allied Erecting & Dismantling Company, Inc., and Allied Industrial Development Corporation respectfully request that Defendants' Motion to Dismiss or In the Alternative Refer to the Surface Transportation Board be denied in its entirety.

Respectfully submitted,



Christopher R. Opalinski, Esq.
(OH Bar No. 0084504)
copalinski@eckertseamans.com
Timothy Grieco, Esq. (Pa. I.D. No. 81104)
tgrieco@eckertseamans.com
Jacob C. McCrea, Esq. (Pa. I.D. No. 94130)
jmcrea@eckertseamans.com

Eckert Seamans Cherin & Mellott, LLC
Firm Pa. No. 075
44th Floor, 600 Grant Street
Pittsburgh, PA 15219
(412) 566-5963
Fax: (412) 566-6099

Jay M. Skolnick, Esq. (# 0006767)
jmskolnick@nnblaw.com

Nadler Nadler & Burdman Co., LPA
20 Federal Plaza West, Suite 600
Youngstown, OH 44503- 1423
(330) 744-0247 / Fax: (330) 744-8690

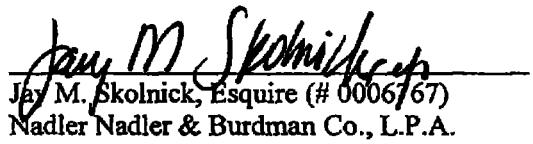
Attorneys for Plaintiffs
Allied Erecting and Dismantling Co., Inc.
Allied Industrial Development Corporation

Date: May 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss or In the Alternative Refer to the Surface Transportation Board was served by deposit in the United States mail, first class postage prepaid, this 29th day of May, 2009, as follows:

C. Scott Lanz, Esquire
Thomas J. Lipka, Esquire
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, OH 44503



Jay M. Skolnick, Esquire (# 0006767)
Nadler Nadler & Burdman Co., L.P.A.
Attorneys for Plaintiffs, Allied Erecting and Dismantling Co., Inc. and Allied Industrial Development Corporation